Supreme Court, U.S.
FILED
95 1696 APR 17 1996
OFFICE OF THE CLERK

No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR., AND BRIAN CHARNEY, a minor, by John Charney, his guardian,

Petitioners,

--v.--

ELAINE B. PANITZ,

Respondents.

Petition For a Writ of Certiorari To The Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

KENNETH W. BEHREND
Behrend and Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

Attorney for Petitioners

QUESTIONS PRESENTED

Whether absolute immunity for expert witnesses violates a civil litigant's Fifth and Fourteenth Amendments of the due process right to fairness of trial?

Whether the Superior Court of Pennsylvania violated the Fifth and Fourteenth Amendments by assessing a party counsel fees for appealing a case to the Superior Court when the controlling and deciding issue is an issue of first impression, and has never decided by the Supreme Court of Pennsylvania?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE WRIT. 6

I. ABSOLUTE IMMUNITY FOR EXPERT WITNESSES VIOLATES A CIVIL LITIGANTS DUE PROCESS RIGHTS TO MEANINGFUL ACCESS TO COURT 7

A. Practical Importance of the Issue 7

B. Conflict Among the States 9

C. Constitutional significance 11

II. THE SUPERIOR COURT OF PENNSYLVANIA VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS BY ASSESSING A PARTY COUNSEL FEES FOR APPEALING A CASE TO THE SUPERIOR COURT WHEN THE CONTROLLING AND DECIDING ISSUE IS AN ISSUE OF FIRST IMPRESSION 14

A. The Award of Counsel Fees. 14

CONCLUSION 15

TABLE OF AUTHORITIES

CASES — PAGE

Ake v. Oklahoma, 470 U.S. 68, (1985). 7, 12

Bruce v. Byrne-Stevens & Associates, Eng.,
776 P.2d 666 (1989). 9

Ford v. Temple Hosp., 790 F.2d 342 (3d Cir. 1986). 14

James v. Brown, 637 S.W. 2d 914 (Texas 1982) 10

Levine v. Wiss and Co., 478 A.2d 397 (N.J. 1984). 10

Makuc v. American Honda Motor Co.,
835 F.2nd 389 (1st Cir. 1987). 12

Mattco Forge, Inc. v. Arthur Young & Co.,
5 Cal. App. 4th 392, 6 Cal. Rptr.
2d 781 (1992). 10

Murphy v. A. A. Mathews, 841 S.W. 2d 671
(Mo.banc, 1992) 5, 9, 10

Reilly v. Berry, 166 N.E. 165 (N.Y. 1929). 10

Roadway Express v. Piper, 447 U.S. 752 (1980) 14

Ross v. Moffit, 417 U.S. 600 (1974) 10

Wernimont v. Int'l Harvester Corp.,
309 N.W. 2d 137 (1981). 10

STATUTES AND RULES

U.S. Const. amend. V. 5

U.S. Const. amend VII 5

U.S. Const amend XIV 5

Pa. Const. art. 1 §1 5

Pa. Const. art. 1 §11 5

Sup. Ct. R. 10.1(b) 7

Sup. Ct. R. 10.1(c) 7

28 U.S.C. § 1257(a) 2

MISCELLANEOUS

Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 Harvard Law Revue 40 (1901) 7

Don J. DeBenedictis, *Off-Target Opinions,* November J.A.B.A. 77 (1994) 8
November J.A.B.A. 76 (1994) 8

Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice* Capital University Law Review 692, 707 (1993) 8, 9

Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens 26 Willamette Law Review 1051, 1081 (1990) 9

David Medine, *Expert Assistance in Civil Cases* 41 The Hastings Law Journal 281, 288 (1990)
41 The Hastings Law Journal 281, 289 (1990) 12, 13

No. 95-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR. and BRIAN CHARNEY, a minor, by John Charney, his guardian

Petitioners,

v.

ELAINE P. PANITZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

Petitioners, John Charney, Alice Charney, and their sons, John Charney, Jr. and Brian Charney, respectfully pray that a writ of certiorari issue to the Superior Court of Pennsylvania to review a July 27, 1994 order affirming the order of the trial court and remanding for the trial court to assess attorney's fees.

OPINIONS BELOW

In an unreported opinion and order dated November 22, 1993, the Court of Common Pleas of Westmoreland County, Pennsylvania, Civil Division, granted respondents' Preliminary Objections in the Nature of Demurrer or Motion to Strike and dismissed petitioners' civil causes of action based on the absolute privilege protecting testimony at trial. *Charney v. Panitz*, No. 877 of 1993, 7a.[1] Also in unreported orders, the Superior Court of Pennsylvania, Pittsburgh District, affirmed the Judgment of the Court of Common Pleas on July 27, 1994. *Charney v. Panitz*, No. 2033 (Pa. Super. Ct. July 27, 1994) 6a. The Supreme Court of Pennsylvania, Western District entered an order granting Petition for Allowance of Appeal on March 6, 1995. *Charney v. Panitz*, No. 459 W.D. Allocatur Docket, 1994 (Pa. March 6, 1995), 2a. After argument, the Supreme Court of Pennsylvania, Western District issued a final order on January 18, 1996 dismissing the appeal as having been improvidently granted. *Charney v. Panitz*, No. 17 W.D. Appeal Docket 1995 (Pa. January 18, 1996), 1a.

JURISDICTION

The Supreme Court of Pennsylvania entered an order declining its exercise of jurisdiction in this matter on January 18, 1996, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

---

[1]The opinions and orders are reprinted in the Appendix to this Petition For A Writ of Certiorari. Citations to this Appendix are made to the page number therein as ____a.

STATEMENT OF THE CASE

Virtually all civil litigation in our country requires the hiring of experts for their opinion testimony to prove or to disprove some central issue, critical to or determinative of the case.

Our case raises substantial constitutional questions that are nascent throughout the Unites States in thousands of law suits each year. Our case shows how a litigant can be harmed by his own expert's deception and be effectively denied meaningful access to a due process trial.

Your petitioners, the Charney family members (hereinafter the Charneys), were injured by formaldehyde gas released by the construction products from a newly built home purchased and lived in by them. They hired Elaine B. Panitz, M.D. (hereinafter Panitz) to testify as an expert in a law suit for permanent and debilitating injury caused by inhalation of formaldehyde.

The key defense to a formaldehyde exposure case is that cigarette smokers are exposed to formaldehyde contained in cigarettes, but do not suffer from the ailments that are caused by formaldehyde exposure.

Dr. Panitz represented that she would testify that people who smoked cigarettes were sometimes sensitized to formaldehyde, but were not always aware of it; that sometimes the people who are sensitized from smoking are able to suppress their symptoms; and, that cigarette smoke as it enters the mouth and lips is diluted by the inhalation of air and the use of protective filters.

Panitz, to convince the Charneys to hire her, showed the Charneys her testimony in a previous law suit, known as the Alaskan "Crown Point Litigation". She displayed testimony that she could respond convincingly to cross examination and support her opinion about the critical issue of formaldehyde in tobacco smoke and why it did not cause formaldehyde sensitivity to tobacco smokers.

Dr. Panitz was hired; she assisted in the preparation for the trial, performed medical examinations of the Charneys, authored an expert report and was paid $9,245.00 by the Charneys for her services and billed the Charneys an additional $5,100.00.

At sometime after she was hired, Panitz revised her opinion about the "cigarette smoking". Dr. Panitz decided that she no longer had an opinion why cigarette smokers did not suffer from formaldehyde exposure as a result of smoking.

Throughout the pre-trial preparation, Dr. Panitz did not inform the Charneys or their legal counsel of her new opinion. Therefore, based upon their understanding of the strength of the causal relationship between their injuries and the formaldehyde exposure and Dr. Panitz's ability to handle the "smoking" issue, the Charneys did not accept settlement offers.

At the trial, the issue of the relationship between cigarette smoking and formaldehyde was raised by the defense counsel, and much to the surprise of the Charneys and their legal counsel, Dr. Panitz answered that she did not know why cigarette smokers do not suffer from formaldehyde exposure.

A defense verdict came in after a short summation by defense counsel. The closing argument pointed out that cigarette smokers, who have more exposure to formaldehyde than the Charneys, do not suffer from the formaldehyde exposure, and that the Charneys offered no evidence to explain this. Counsel for the defense argued: since cigarette smokers are not harmed by formaldehyde, neither were the Charneys, and therefore, the Charneys were not able to establish that their injuries came from exposure to formaldehyde.

After Dr. Panitz left the witness stand, she told the Charneys' counsel that she had reached different conclusions, before trial, regarding key issues of formaldehyde and tobacco smoke. When the Charneys and their legal counsel asked her why she had not notified them of her changed opinion, she could not explain why she had not notified the Charneys or their counsel of her true opinions on this subject prior to trial.

The Charneys filed suit alleging a cause of action in tort for professional negligence against a professional who agreed to provide litigation-related services for compensation, as well as to testify at trial by providing expert testimony that was truthful, accurate and consistent with her previously expressed opinions.

The Amended Complaint set forth counts for Breach of Contract, Negligence, Negligent Misrepresentation, and Gross Negligence. The Charneys asserted in their Amended Complaint that Dr. Panitz had been dishonest with them and their counsel, regarding her true expert opinions, in order to secure employment by the Charneys or had significantly changed her opinion regarding a key element of the case after being hired, but before giving testimony, and had kept such information to herself, which frustrated the Charneys' and their attorneys' ability to make informed decisions on the conduct of their case and trial, including evaluation of the case for settlement purposes.

Panitz filed preliminary objections. The preliminary objections were sustained by the trial court ordering that Panitz had absolute immunity for her acts before testifying and while testifying.

Appeal was taken to the Superior Court of Pennsylvania. The Charneys cited the Pennsylvania Constitution, Article I, Section 11 and asserted the United States Constitution, the Fifth, Seventh, and Fourteenth Amendments. The Charneys argued that other states did not grant absolute immunity to expert witnesses.

The Superior Court of Pennsylvania found no error and found the appeal to be frivolous and an award of counsel fees to Panitz was found warranted, to be determined in amount by the trial court on remand.

The Charneys petitioned for review to the Supreme Court of Pennsylvania. Allocatur was granted. The Court called for briefs and oral argument. The Charneys argued that the decision of the Superior Court to give absolute immunity to an expert witness was in conflict with the law of the State of Missouri, Murphy v. Mathews, infra and three other states and cited the Pennsylvania Constitution, Article I, Section 1 and the United States Constitution, Fourteenth Amendment. The Charneys argued that the amerce of counsel fees for Panitz was violative of the Pennsylvania Constitution and the United States Constitution because the opinion and order for counsel fees was entered without notice of consideration or an opportunity to be heard, and that they were entered capriciously by the Superior Court because the issue

of absolute immunity was one that had not yet been decided by the Supreme Court of Pennsylvania.

On January 18, 1996, the Supreme Court of Pennsylvania dismissed the appeal as having been improvidently granted.

If the Charneys had been permitted to go to trial, instead of being dismissed by preliminary objections, it would have been proven that Panitz was employed as an expert witness to support that the Charneys injuries had been caused by formaldehyde. However, Panitz testified that frequent exposure to gaseous formaldehyde caused sensitivity and debility with respect to much of daily living and work, and then was unable to answer when asked why cigarette smokers did not get sensitized even though cigarette smoking produced formaldehyde. She had previously told the Charneys that she had a good and scientific explanation to explain this apparently contradictory phenomena.

In the instant case, it would have been proven that Panitz had changed her opinion before trial and for some reason she did not inform the Charneys of the same. The claim was lost because of the deliberate and continuing misrepresentations of Panitz to the Charneys. No attempt was made to postpone the trial because the Charneys did not know of the danger Panitz had created, until after she testified. Offers to settle were turned aside, in reliance of the opinion given to the Charneys, to their harm.

REASONS FOR GRANTING THE WRIT

This case presents matters of grave importance to the thousand of litigants and their counsel involved in law suits throughout the United States. The court of last resort in Pennsylvania has declared the law to be that an expert hired to testify in court by a litigant has immunity from suit. The courts of last resort of Missouri, New Jersey, Texas, and California have declared the law to be that there is not to be absolute immunity. This conflict among courts of the various states should be settled by this court. The awarding of counsel fees is threatening to become endemic. Orderly guidelines should be established by this court. This case meets the standards for granting a writ of

certiorari set forth in Sup. Ct. R. 10.1(b) and 10.1(c).

I. ABSOLUTE IMMUNITY FOR EXPERT WITNESSES VIOLATES A CIVIL LITIGANT'S DUE PROCESS RIGHTS TO MEANINGFUL ACCESS TO COURT

A. Practical Importance of the issue.

The late Justice Thurgood Marshall observed, "We recognized long ago that mere access to the Courthouse doors does not by itself assure a proper functioning of the adversary process ..."

Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

Virtually all civil litigation in our country requires the hiring of experts for their opinion testimony to prove or to disprove some central issue, critical to or determinative of the case.

Both client and lawyer have only minimal credentials to pick or supervise an expert to testify. It is largely a situation of trust. To grant immunity to a fraudulent and negligent expert can only encourage misrepresentation and carelessness in preparing and presenting expert opinion, contempt for the employing party and indifference to the court process.

The use of expert testimony has been employed at least since the time of the venerable Bracton. Different means of employing such testimony were in vogue over the many years since Bracton. Today the vogue is to call before the jury skilled persons as witnesses.

> No doubt, there are good historical reasons why this ... method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience."

15 Harvard Law Revue 40, Historical and Practical Considerations Regarding Expert Testimony by Learned Hand

> A faulty analysis by a hired expert could lead an attorney to abandon a strong case or pursue a weak one, notes Edward Imwinkelried, an evidence expert at the University of California at Davis School of Law. "They can cause you to lose your case and waste horrendous amounts of money."

November J.A.B.A 77 (1994), Off-Target Opinions

> With expert witnesses being paid to testify on everything from alloys to zygotes, courts are increasingly willing to let clients sue their hired guns who misfire on the stand.

November J.A.B.A 76 (1994), Off-Target Opinions

A search of law review articles reveals that thought has been given to the problem of the expert witness, their ubiquitous employment and just how they can best mesh with our tested, tried and acclaimed adversarial system, which has been acclaimed the best devised. Law Review articles with believable uniformity convincingly set forth arguments urging that expert witnesses be made responsible for careless and callous work and that they be subject to the possibility of being held responsible for their negligence and misrepresentation. This should have the salutary effect of improving the quality of analysis and testimony.

> Potential liability also provides a form of quality control over expert services. Most litigants are incapable of assessing their experts' competence. Accordingly, the long-established contract principle of caveat emptor is inapplicable. If experts are exposed to liability for their litigation support services or forensic activities, they will necessarily strive to be more accurate and careful in their work. Of course, experts' heightened accuracy and care ultimately benefit their clients. Indeed, expert witnesses' enhanced

> professional services are rendered in connection with litigation, instead of in an office, on a construction site, or in a hospital should not deny the experts' clients basic protection. (Emphasis added)

Capital University Law Review 692, 707 (1993), The Emerging Theory of Expert Witness Malpractice.

> Given the special relationship that exists between the client and the expert, coupled with the expert's unique role in the judicial process, a ... realistic and just rule is warranted. (emphasis added).

26 Willamette Law Review 1051, 1081 Absolute Immunity for the Negligent Expert Witness: Bruce V. Byrne-Stevens

B. Conflict Among the States

Bruce v. Byrne-Stevens & Associates, Eng., 113 Wash. 2d 123, 776 P.2d 666 (1989) is the leading authority for absolute expert witness immunity. It is a plurality decision with one Justice concurring in the result only.

Contrary to Bruce is Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo.banc 1992). The holding there was that witness immunity is not to be extended to a professional who agreed to provide litigation related services for compensation, if there is professional negligence in providing the agreed services.

> Our decision is based primarily upon the commercial relationship assumed by the professional and his or her role as an advocate. Expert witnesses have taken on a growing role in modern litigation. Not only do they testify in more and more cases, but they also play a substantial role in case preparation. Often they play as great a role in the organization and shaping

> and evaluation of their client's case as do the lawyers. Those who provide these services are selected for their skill and ability and are compensated accordingly, just as any other professional. More often than not, their role is as an advisor and advocate as opposed to an objective and independent witness.
>
> We find no reason or principle of public policy justifying the extension of witness immunity to professionals retained for litigation support services.
>
> In short, Mathews was not an independent fact or opinion witness with information to be presented to the court in an objective manner. Mathews agreed to provide his expert services to American to assist it in the preparation of its claim.

Murphy v. A. A. Mathews, 841 S.W.2d 671 (Mo.banc 1992).

The three other jurisdictions that have found against granting expert immunity are: The Supreme Court of Texas, James v. Brown, 637 S.W.2d 914 (Texas 1982), the Supreme Court of New Jersey (Dr. Panitz' home state) in Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984), and in a California appellate decision, Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal.App. 4th 392, 6 Cal.Rptr.2d 781, (1992)

The Pennsylvania Court, in reaching its decision, did not consider the true role of an expert in litigation today. During preparation for trial the expert becomes an assistant advocate and is available for exposing technical weaknesses in the opponent's case and formulates questions and arguments for the client. The expert does not act at trial on the court's behalf, but can best help the court and the litigation process by serving and performing as an assistant advocate.

It is necessary that the expert be a shepherd and protect the client from the ravages of partisan testimony of the opposition

expert by alerting the party for whom the expert is working to possible asserted positions of testimony by the opposition expert and suggesting the fallacies of theory and misapplication of facts upon which a misconceived or misleading opinion can be asserted.

The expert cannot do his job properly without being an advocate. The fact that there is litigation with expert opinion presupposes that there is a conflict of opinion, probably varying by the facts proven. Facts upon which an opinion can be based are such that counsel has to be instructed how to present them so that they are clearly and completely presented with full explanation as to their importance. Similarly, facts that are misleading, obfuscate and give the false appearance of validity to an opinion, must be warned about and unveiled.

What vestige of the magic of the courtroom shall we cling to? Shall we perpetuate the myth of the expert not being an advocate? This only hides the truth from the jury and promotes a false ring to the trial. The advocacy of an expert in deference to the goal of fair trial should be disclosed. To do less is to continue, a charade and false facade that will cause contempt for the honesty of trials.

We need to look at what is the epistemology of the American Jury Trial System. Our system is to arrive at truth by the friction of competing ideas.

We should remember that expert opinion testimony has been considered to be at the bottom of the evidence valuation scale. Opinion testimony is not factual testimony, it only becomes factual when the jury has accepted and adopted it.

C. Constitutional significance.

The general problem of experts and their testimony has been dealt with by The Supreme Court of the United States concerned with the specific problem of indigent rights to expert assistance and expert witness testimony. Due process under the 5th and 14th Amendments requires that a litigant be permitted to be "heard" effectively through an expert where the matter in

controversy must be explained and opined upon by an expert. The expert is an indispensable element in many cases (and was in ours). Wernimont v. International Harvester Corp., 309 N.W.2d 137 (1981) (defectiveness); Makuc v. American Honda Motor Co., 835 F.2d 389 (lst Cir. 1987) (causation); Ross v. Moffit, 417 U.S. 600 (1974).

> "[A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witness the thrusts of those against him." -- Judge Cardozo

Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929), quoted in Ake v. State, 470 U.S. 68 at 82 n 8 (1985).

Without some form of assistance a litigant is often unable to assert legitimate claims or defenses. some instances of eye catching value are:

> "... accounting in tax cases; analysis of glass, teeth and bite marks, and medical opinions in tort actions; handwriting, typewriter, and ink analysis in contract and will cases; genetic testing for paternity; psychiatric and psychological reports in family disputes; and technology based evidence such as neutron activation analysis, atomic absorption spectrometry, trace metal detection, and gas chromatography. The list seems endless. **The absence of such testimony could be dispositive in many cases.**" (Emphasis Added)

41 The Hastings Law Journal 281, 288 (1990), Expert Assistance in Civil Cases.

Shall we say and agree that expert testimony is big business and that only government business should have immunity? The job of the expert witness is so much larger than just the time spent in testifying.

> In a highly specialized area, counsel for an ... litigant, ... may have no idea where to look for evidence or how to deal with it when it is found.

> Expert witnesses can play a critical part in the preparation of a case. They can assist ... counsel in planning the presentation of the case, and in gathering and organizing the available evidence.

41 The Hastings Law Journal 281, 289 (1990), Expert Assistance in Civil Cases.

The Supreme Court of the United States has recognized the need to supply expert witness assistance and testimony in indigent cases. We have cases that recognize that there is a right, subject to certain requirements, as to whether an indigent shall be given paid for expert assistance in civil cases. In our case. the expert was privately provided. However, we cannot let due process stop with the appearance of an expert. An expert who is careless and deceptive in litigating and causes harm to his litigator is an abomination in the legal system. The question that should be asked is why permit the suit, if the litigant's best shot is destroyed by carelessness or fraud for which there is no recourse. The notion that truth and honesty of the expert will be made more likely by granting immunity than requiring responsibility is a surmise. It is a certainty that the quality of expert assistance and expert testimony will not be improved by removing responsibility. Can we not decide that good workmanship, a thorough work-up of a problem, good craftsmanship begets honesty? Is it not true, that deliberate misstatements are made when the perpetrator is attempting to conceal shoddy work?

Honesty and candor require an immediate disclosure of change of opinion. Giving immunity and taking away responsibility offers the potential for carelessness and abuse. The requirement to answer, as a responsible professional with financial consequences, could have averted injustice and can avert it in the future. The potential arrogance that follows immunity can only work for the diminution of and disregard for our courts.

II. THE SUPERIOR COURT OF PENNSYLVANIA VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS BY ASSESSING A PARTY COUNSEL FEES FOR APPEALING A CASE TO THE SUPERIOR COURT WHEN THE CONTROLLING AND DECIDING ISSUE IS AN ISSUE OF FIRST IMPRESSION

A. The Award of Counsel Fees.

The Pennsylvania Superior Court's decision assessing counsel fees in this case gives rise to substantial constitutional questions with grave importance to the thousands of litigants and their counsel involved law suits in this country.

The effect of the Pennsylvania Superior Court's decision would be the preclusion of many appeals that have merit and that might challenge an adverse ruling by the Superior Court, even in those cases where there may be significant cause to question whether the Superior Court was acting constitutionally or had misstated the law of the Commonwealth of Pennsylvania for fear of sanction by that Court.

The opinion and order of The Superior Court of Pennsylvania awarding counsel fees was made without fair and adequate prior notice of consideration.

The order for counsel fees was entered capriciously as the issue of absolute immunity for an expert witness had not been decided by the Supreme Court of Pennsylvania.

The order for counsel fees (amerce) is in violation of the fifth and fourteenth amendments to the Constitution of the United States. It is contrary to Roadway Express v. Piper, 447 U.S. 752 (1980).

The amerce of the Superior Court of Pennsylvania is an appropriate example of a "chilling effect" contrary to due process.

> Despite the tensions of the job, trial judges must have the patience and the resolve to tolerate

> advocates who are not gracious losers and who argue propositions on the marginal edge of evolving doctrines. For history teaches us that in the evolution of the law, legal propositions that were almost heresy one day often at a later time become the law of the land.

Ford v. Temple Hosp., 790 F. 2d 342, 349 n. 11 (3d Cir. 1986), quoting Baker Indus. v. Cerberus, Ltd., 764 F. 2d 204, 224 (3d Cir. 1985) (Higginbotham, J., dissenting).

CONCLUSION

For all of the aforesaid reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth W. Behrend
Counsel of Record
BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515
Counsel for Petitioner

Dated: April 17, 1996